

1. 1417959 (Migration) [2015] AATA 3868 (10 December 2015)

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DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Ms Dina Marcela Guzman Usuga

CASE NUMBER: 1417959

DIBP REFERENCE(S): BCC2014/1895908

MEMBER: Gabrielle Cullen

DATE: 10 December 2015

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Student (Temporary) (Class TU) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 572 Vocational Education and Training Sector visa:

- Public Interest Criterion 4020 for the purposes of cl.572.224 of Schedule 2 to the Regulations.

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Statement made on 10 December 2015 at
1:11pm

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

5. This is an application for review of a decision made by a delegate of the Minister for Immigration on 17 October 2014 to refuse to grant the applicant a Student (Temporary) (Class TU) visa under s.65 of the *Migration Act 1958* (the Act).
6. The applicant applied for the visa on 4 August 2014. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.572.224 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the delegate found that the applicant had provided documentation which did not meet Public Interest Criterion 4020 (PIC 4020).
7. The applicant appeared before the Tribunal on 10 December 2015 to give evidence and present arguments. The Tribunal also received oral evidence from her partner, Dane Brett and his father, Paul Brett. The Tribunal hearing was conducted with the assistance of an interpreter in the Spanish (Central and South America) and English languages.
8. The applicant was represented in relation to the review by her registered migration agent.
9. Evidence was also provided prior to the hearing in a submission dated 7 December 2015 which included statements from the applicant, her partner, Mr Dane Brett and his sister, Ms Megan Joy Morgan as to the genuine nature of the relationship and the impact that the applicant's departure from Australia would have on Mr Brett
10. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration

CONSIDERATION OF CLAIMS AND EVIDENCE

11. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.572.224 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: cl.4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy cl.4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: cl.4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2B) and (2BA).

12. The requirements in cl.4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: cl.4020(4). However, this waiver does not apply to the identity requirements in cl.4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

HAS THE APPLICANT GIVEN, OR CAUSED TO BE GIVEN A BOGUS DOCUMENT, OR INFORMATION THAT IS FALSE OR MISLEADING IN MATERIAL PARTICULAR?

13. The term 'information that is false or misleading in a material particular' is defined in cl.4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in cl.4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Batra v MIAC* [2013] FCA 274.
14. The requirement in cl.4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: cl.4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
15. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
16. The information before the Tribunal from the Department as outlined in its decision¹ is that the applicant submitted with her application for a student a Columbian Bank statement in the name of the applicant's grandmother, Rose Amelia Postada Castaneda to show the applicant met the Schedule 5A financial requirements as required to meet cl.572.223. On 13 August 2014 the Department wrote to the applicant asking her to comment on the suspected "non-genuine nature" of the document. The applicant contacted the Department by telephone and advised it was genuine and the Department advised her to respond in writing. She subsequently sent a number of documents but did not address the claimed fraudulent document.
17. In the applicant's submission to the Tribunal dated 7 December 2015 the applicant indicated she accepts that the document she provided to the Department is bogus but she did not know this to the case. She acknowledged that personal knowledge is not relevant as to whether a document is bogus or not. As a result she submitted that she accepts cl. 4020 is enlivened.
18. The applicant confirmed at the hearing held on 9 December 2015 that the document is not genuine but repeated that she did not know that to be the case.
19. On the basis of the evidence before it, the Tribunal is satisfied that that the applicant has given or caused to be given to the Department a bogus document in relation to the application for the visa.
20. Therefore, the applicant does not meet cl.4020(1).

¹ The Department decision was attached to the Application for Review

HAS A VISA PREVIOUSLY BEEN REFUSED ON THE BASIS OF A FAILURE TO SATISFY CL.4020(1)?

21. Clause 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy cl.4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: cl.4020(2AA).
22. There is no evidence before the Tribunal to suggest that the applicant or any member of her family unit has been refused a visa on the basis of PIC4020(1) in the period commencing 3 years before the application was made. Therefore cl.4020(2) is satisfied.

SHOULD THE REQUIREMENTS OF CL.4020(1) BE WAIVED?

23. The requirements of cl.4020(1) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa.
24. The evidence provided in the submission dated 7 December 2015 and at the hearing on 9 December 2015 indicates the applicant has been in a relationship with an Australian citizen, Mr Dane Brett from 2012 and since August 2015 they have been living together in a de facto relationship. The applicant has submitted a NSW Relationship Certificate with Dane Brett as her partner dated 29 July 2015.
25. At the hearing the applicant, her partner and his father provided evidence as to the genuine nature of the relationship. A letter of support has also been provided by Mr Brett's sister. The applicant and her partner indicated they rent their apartment together and are both named on the lease and could provide numerous photos of their relationship since it began in 2012.
26. Mr Dane Brett, the applicant's partner confirmed he was born in Australia and is an Australian citizen. He outlined the difficulties he would face if the applicant was required to depart Australia, including the psychological impact this would have on him. He added that in the past week he has been very stressed about the upcoming hearing and that she may possibly be refused and this has affected his work productivity by half. He also said he has not been sleeping well. Both he and the applicant outlined how they want to in the future start a family together and how they are in a loving and supportive relationship and want to further build their relationship. Mr Dane Brett indicated he could not return with the applicant to Columbia as he did not speak Spanish, had a permanent job in Australia with Coles and wants to open a business in health and fitness. He said he had obtained Vocational degrees in these areas. He also indicated he only eats organic food and this would be difficult to achieve in Columbia. Mr Brett's father, who is also an Australian citizen, stressed the importance of the applicant to their family and the effect on the family if either or both the applicant and his son had to leave to live in Columbia.
27. The applicant also indicated she is a genuine student, currently studying a Diploma of Business and recently successfully completed a Certificate III in early Childhood Education and Care.²

² Documents were provided in this regard including a current CoE as to the Diploma of Business and having successfully completed the Certificate III in Childhood Education. Also submitted was a certificate indicating she achieved outstanding academic performance in the recent semester in the Diploma of Business.

28. On the basis of the evidence before it the Tribunal finds that the applicant is in a de facto relationship with an Australian citizen who has a permanent full time job in Australia. The Tribunal accepts it is a loving and caring relationship and the applicant is now also part of her partner's family. The Tribunal accepts if the applicant had to depart Australia this would cause great stress and unhappiness to the applicant and his family. It accepts that it is unlikely the applicant's partner would travel to Columbia due to his focus on organic food, as he does not speak Spanish, has a full time job and is planning to open a health and fitness business. The Tribunal accepts that if the applicant is prevented from making another visa application for a period of three years, the applicant's partner Mr Dane Brett would be greatly impacted, including psychologically, and he would be under much stress which would affect his day to day life and work performance. The Tribunal is satisfied that if she is prevented from making another visa application for a period of three years her relationship would be under great pressure.
29. The Tribunal is therefore satisfied that there are compassionate or compelling circumstances that affect the interests of an Australian citizen that justify the granting of the visa.
30. It finds the requirements of cl.4020(1) should be waived.

HAS THE APPLICANT SATISFIED THE IDENTITY REQUIREMENTS?

31. Clause 4020(2A) requires an applicant to satisfy the Tribunal as to his or her identity. The applicant provided the Department with a copy of her Columbian passport. The applicant therefore satisfies cl.4020(2A).

HAS A VISA PREVIOUSLY BEEN REFUSED ON THE BASIS OF A FAILURE TO SATISFY CL.4020(2A)?

32. Clause 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: cl.4020(2BA).
33. There is no evidence before the Tribunal to suggest that a visa has previously been refused on the basis of a failure to satisfy cl.4020(2A). Therefore cl.4020(2B) is met.
34. On the basis of the above, the applicant satisfies PIC 4020 for the purposes of cl.572.224.

DECISION

35. The Tribunal remits the application for a Student (Temporary) (Class TU) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 572 Vocational Education and Training Sector visa:
- Public Interest Criterion 4020 for the purposes of cl.572.224 of Schedule 2 to the Regulations.

Gabrielle Cullen
Member

ATTACHMENT

MIGRATION REGULATIONS 1994

SCHEDULE 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; the applicant and each member of a family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

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MIGRATION ACT 1958

S.5 INTERPRETATION

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

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